No. 15042

United States Court of Appeals

For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

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RECORD

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United States Court of Appeals
For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15042

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction in the District Court was based on all the facts alleged in the Amended Complaint (Tr. 3-28) and upon 28 U.S.C. §2410 and 28 U.S.C. §1346(a)(2). Jurisdiction was also based on 28 U.S.C. §1340 (Tr. 4) and 28 U.S.C. §2463 (Tr. 5, 7, 8, 9).

The District Court, having entered an order granting a dismissal for want of jurisdiction of appellant's Amended Complaint jurisdiction in the Court of Appeals is based on 28 U.S.C. §§1291, 1294.

STATEMENT OF THE CASE

The only question involved in this appeal is whether a federal court has jurisdiction of an action to quiet title to funds in appellant's hands, and to contract funds in the hands of a collecting bank which have

been assigned to appellant, as against levies of the United States against appellant for liens based on taxes due by a corporate taxpayer, not appellant, which taxes accrued after the corporate taxpayer made a duly recorded chattel mortgage in trust for the benefit of unsecured creditors to appellant, and which liens and levies were made after said corporate taxpayer executed a bill of sale to appellant of all its assets and after appellant had reduced all of said assets to cash and all of the contracts in the hands of the collecting bank had been paid in full.

The lower court held that it had no jurisdiction, after a hearing on a motion to dismiss. No facts were in dispute.

SPECIFICATION OF ERRORS

1. The District Court erred in granting appellee's motion to dismiss for want of jurisdiction.

ARGUMENT

Summary

It is appellant's contention that the statutes of the United States grant to the federal courts jurisdiction to try a quiet title action to funds in the hands of a third party, not the taxpayer, which have been levied upon as the taxpayer's property pursuant to liens filed against the taxpayer.

Statutes

Until 1942, the predecessor to 28 U.S.C. §2410 (28 U.S.C. §901) read as follows, insofar as it affects this controversy:

> " . . . the United States may be named a party in any civil action or suit in any district court, * * * or in any state court having jurisdiction of the subject matter, for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

In 1942, the statute was amended to read as follows (by Act of December 2, 1942, Ch. 656, 56 Stat. 1026):

> " * * * the United States may be named a party in any civil action or suit in any district court, * * * or in any state court having jurisdiction of the subject matter, *to quiet title to or* for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (Italics supplied to denote added portion)

Various minor changes were made in this statute in 1948 and 1949 when the Judiciary Act was recodified, but none of those changes affect the import of this case.

Other statutes bearing on jurisdiction are 28 U.S.C. §§1340, 1346, 2463, to which reference will be made later.

Legislative History

Appellees may try to make much of the legislative history of the Act of December 2, 1942 (Ch. 656, 56 Stat. 1026) (28 U.S.C. §2410) by citing some excerpts from S.R. No. 1646, 77 Cong., 2d Session, which leave the impression that the insertion of the "quiet title" words was intended to apply only to real estate.

If this were so, the Act in 1942 could easily have been drafted to confine the added words to this specific inten-

tion by supplying the words "real estate" after "to quiet title to."

Even if the first purpose of the amendment was t assist real estate titles, there is no reason known to r why it should not be given its fullest meaning as presently drafted, *i.e.,* to clear clouds from real and personal property.

The Lower Court's Decision

In its Memorandum Decision (Tr. 30-31), the lower court ruled that appellant's action must be dismissed for want of jurisdiction. It based its decision on the premise that 28 U.S.C. §2410 was limited solely to situations involving judicial sales.

While conceding that there was one Circuit Court opinion to the contrary, the lower court based its ruling on one other Circuit Court decision and four District Court decisions.

The one Circuit Court decision, *Metropolitan Life Insurance Co. v. U. S.* (6th Cir.) 107 F.(2d) 311, on which the lower court here relied is not applicable for two reason; first, it was decided in 1939 prior to the 1942 amendment set forth above, and second, at no place in the decision is §2410's predecessor, 28 U.S.C. §901, considered. Moreover, the suit was not one to quiet title, but was in fact, a proceeding to extinguish a lien. Nowhere in the present action does appellant ask to have the government's lien extinguished. It merely asks for a declaration that the levy does not apply to the funds in appellant's hands, or which appellant is entitled to draw down from the collecting bank.

In granting that one Circuit Court decision, *Adler v. Nicholas* (10th Cir.) 166 F.(2d) 674, was in favor of appellant, the lower court nevertheless overlooked one other case supporting appellant's position, to-wit: *Jones v. Tower Production Co.* (10th Cir.) 138 F.(2d) 675 decided in 1943. There were, therefore, at the time of the decision herein, two Circuit Court cases upholding appellant's position, both of which were cited to the lower court, and there were no cases denying jurisdiction, at least since 1942. No recent cases have been found, and the Supreme Court of the United States has not passed on the subject.

The lower court, therefore, rested its entire opinion on four District Court cases. Of these, the first, *Integrity Trust Co. v. U. S.,* 3 F.Supp. 577, was decided before 1942. Following the existing statute, §901, the New Jersey District Court held that U. S. liens could be removed only by sale of the affected premises and not by strict foreclosure.

The next case cited, *Borough of Kenilworth v. Corwine,* 96 F.Supp. 68, was also a New Jersey case but involving the exact facts as the previous case. On the authority of the *Integrity Trust Co.* case, *supra,* the district court denied jurisdiction, holding

> " . . . that consent to be sued in a strict foreclosure proceeding had not been given by the United States, since the statute contemplated a judicial sale."

The next case cited is *Miners Sav. Bank of Pittston, Pa. v. U. S.,* 110 F.Supp. 563. In this action the plaintiff bank had foreclosed prior recorded real estate mortgages and the value of the property at the time of sale

was less than the amount of the mortgage. The bank then entered into a contract to sell the property but found that the United States had filed tax liens against the property after the taking of the mortgage but before foreclosure. The bank sued to quiet its title as against the United States lien for taxes. The government had not been named as a party to the foreclosure proceedings.

The government insisted that the bank was obliged to follow sale proceedings prescribed in 26 U.S.C. §3679. The court held that the bank had another remedy provided by the amended §901, now 28 U.S.C. §2410(a), saying:

> "Under similar circumstances, prior to the 1942 amendment to the Act of 1931, the Courts were in conflict as to the relief which might be afforded."

In a footnote, the Pennsylvania district court referred to the two conflicting views. In one, the court under old §901 had to order a sale. This line of authorities was represented by the *Metropolitan Life Ins. Co.* case, *supra.* In the other view, when it was obvious that the value of the property was insufficient to satisfy even a prior lien, the court could order cancellation of the tax lien without sale (See authorities cited in Footnote 24). The district court went on to say:

> "Confronted by the diversity of opinion, Congress passed the 1942 amendment to include actions to quiet title in addition to those for foreclosure of mortgages and other liens. This in effect extended the scope of relief which could be granted in actions brought under the Act."

The court went on to enter a decree cancelling the government's lien.

We would therefore argue that the foregoing case supports our position rather than the government's, inasmuch as no judicial sale was found necessary.

The last case cited by the lower court is *Bank of America Nat. Trust & Sav. Assn. v. U. S.,* 84 F.Supp. 387. In this action, the court ordered a resale of the property foreclosed by the plaintiff but fixed the priority of the liens. Plaintiff had neglected to join the United States, the holder of inferior tax liens, in its foreclosure. The facts are not applicable to the present case, nor was there any discussion of or reference to §2410.

If the words "judicial sale" in 28 U.S.C. §2410 (c) were held to control, as the lower court seems to decide, then the quiet title provisions of §2410(a) could have no meaning. It goes without the necessity of citation that there is no judicial sale in a quiet title action.

In our opinion, the meaning of §2410(c) is confined to those cases where a judicial sale is a part of the procedure used. The legislative wording is required because of the lack of existence of any federal procedure in foreclosure actions. It should not be broadened to restrict the effect of the quiet title amendment.

Authorities Supporting Jurisdiction

The federal courts have long sought ways and means to prevent the United States from collecting the taxes of a third party from a non-delinquent taxpayer. Despite prohibitions against the issuance of injunctions to restrain the collector from collecting taxes, some courts have by-passed the statutes and held them inapplicable. The effect of these decisions has been to per-

mit suits by third parties to enjoin the collector from levying on property belonging to the third party to satisfy the tax liability of another. See *Jones v. Kemp* (10th Cir.) 144 F.(2d) 478; *Tomlinson v. Smith* (7th Cir.) 128 F.(2d) 808, and *Rothensies v. Ullman* (3rd Cir.) 110 F.(2d) 590.

Most courts which have passed on the subject felt that the 1942 amendment to 28 U.S.C. §901, now §2410, removed the problems presented heretofore. The first case to invoke the new wording was *Jones v. Tower Production Co.* (10th Cir.) 138 F.(2d) 675.

In that action, plaintiff sued the collector to enjoin the enforcement of a lien and levy. It appears that plaintiff owned an undivided interest in three oil and gas leases upon which the collector levied for taxes due by one Wofford who had no interest in the leases except that he had once held an interest in the company which previously owned the leases. The Circuit Court held that the plaintiff had sued the wrong party defendant but permitted the plaintiff to amend to add the United States saying:

> "The real purpose of the action was to secure an adjudication that the beneficial title to an undivided one-half interest in the leases never vested in Wofford and that the tax lien of the United States never attached thereto. It was not the simple case where a Collector seeks to collect by distraint the taxes of one person out of the property of another. There was a real controversy, presenting substantial issues of law and fact, respecting the title to an interest in the leases and funds and the claim that the lien of the United States attached thereto. It was necessary to determine that controversy be-

fore the relief sought could be granted. It was, in substance, an action to determine title and the rights of the United States under a tax lien asserted by it against such interest and the funds. Upon the issues thus presented, the United States was entitled to be heard."

The next case in the Circuit Courts was *Adler v. Nicholas* (10th Cir.) 166 F.(2d) 674. This case is very much in point in the present controversy. In this action, the taxpayers had been engaged in the jewelry business but had been forced to sell out because of growing debts. The sale proceeds, along with additional funds of one Evans, were deposited with a bank to pay off partnership debts. The collector levied on the bank for unpaid partnership taxes and for unpaid individual taxes of the individual partners. The taxpayers and Evans sought to enjoin the collection. Since the partnership property was not subject to individual liabilities until the partnership debts were paid, the Court held that the action could be maintained although the United States was a necessary party. In this particular case, the Court held an injunction would lie, saying:

"Whether the debt due Mrs. Evans, as subrogee of the general creditors, is a liability of the partnership that takes precedence over the lien of the Government for these income taxes is a question to be resolved on the merits by the trial court. We merely hold that as to the interest of Adler and his wife in the net proceeds of the partnership, if any, and the interest of Mrs. Evans in the assets of the partnership, as subrogee, they had such an interest in the property as would permit them to maintain an action to enjoin the Government from selling the same in violation of their rights there-

in. As to such property, they were not taxpayers and were, therefore, not subject to the applicable statutory provisions which require the taxpayer to pay such tax under protest and then to sue to recover. They stand in the relationship of third parties claiming an interest in property which the Government asserts a right to sell to satisfy an income tax liability of another, and could, therefore, maintain this action to establish their rights, if any, therein.

"So here also the Collector has proceeded by a warrant of distraint against the property and funds that are claimed by third parties. The substance of the action is to determine the title and interest in these funds and the right of the United States under a tax lien asserted against the same. Upon these issues, the United States was a necessary party, and under the statute cited in the Tower Production Company case, the United States has consented to be sued."

Another case in point is *National Iron Bank v. Manning* (N.J.) 76 F.Supp. 841. Here, Mary Walsh, a life beneficiary of Mr. Walsh's trust, assigned part of her income to plaintiff. The assignment was recognized by the trustee. Thereafter, the United States made a levy on the trustee for Mary's taxes. Plaintiff sued to enjoin collection on the ground that the money in the trustee's hands did not belong to Mary. The District Court denied the Government's motion to dismiss holding that since 1942, it had jurisdiction of such controversies under the provision of §2410.

Some cases have held that §2410 alone is not sufficient to confer jurisdiction. Such cases include *Haldeman*

U. S. (Mich.) 93 F.Supp. 889; *Viviano v. U. S.* (Mich.) 105 F.Supp. 312, and *Wells v. Long* (9th Cir.) 162 F. (2d) 842. The first two cases amounted to suits to enjoin the collection of taxes by a taxpayer and are not applicable. The last case involved real estate owned outright by the United States to which the plaintiff sought to quiet title. It also is not pertinent.

One case holds that §2410 alone is sufficient. This is *Petition of Sills* (N.Y.) 115 F.Supp. 293, wherein petitioner sought leave to file suit against the United States to remove a cloud on title to real estate liened by the United States for taxes of another after petitioner acquired title. In denying the petition as unnecessary, the Court said:

> " . . . the petitioner, a non-delinquent taxpayer, not a party to the tax claim, . . . has adequate remedy under Title 28 United States Code, §2410 to test the validity of the tax lien filed against his real property in any State Court having jurisdiction or in any district court provided that the parties in the latter court meet the jurisdictional requirements of the Federal Court. §2410 provided the necessary waiver of immunity of the United States as a party, thus obviating application for leave to sue the United States or to file a civil action against it (Citing cases). An examination of the *Stuart* case and the other cases cited clearly show that such innocent third persons, and the petitioner is in that category, may test the validity of a tax lien in the manner heretofore stated. The *Haldeman* case is distinguishable from the case at bar in that the petitioners were delinquent taxpayers and thus relegated to the Internal Revenue Act for relief rather than to said §2410."

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The Stuart case referred to above is *Stuart v. Chinese Chamber of Commerce* (9th Cir.) 168 F.(2d) 709. In that action, the Director had seized money in the hands of the delinquent taxpayer for liens filed. The money belonged to plaintiff who sued to recover it. In answering the challenge to the jurisdiction, the Court said:

> "The appellees could not have maintained a suit for refund as could a taxpayer from whom a tax had been illegally collected; their only recourse was to bring suit to recover possession of the property in which they claimed to be owners. An action of this nature necessarily brings into issue title to the property seized and in this respect it is similar to a suit to quash a warrant for distraint. The effect of the court's order is merely to resolve all claims to the property under distraint.
>
> "From early days the Supreme Court has held that district courts having jurisdiction of property taken or detained by revenue officers under authority of any revenue law of the United States are given power to decide claims of title and to award to the rightful owner possession of the property seized."

There should be no argument that the funds in the present case are as effectively detained as if the Director had them in his possession. Plaintiff cannot disburse those funds until the levy is lifted. Thus if more than §2410 is needed for jurisdiction, it is provided by 28 U.S.C. §2463. A case in point is *Gerth v. U. S.* (Calif.) 132 F. Supp. 894.

Other cases have held that if more than §2410 is needed to supply jurisdiction, then the provisions of 28 U.S.C. §1340 will do, at least where taxes of any kind

are involved. To this effect see *Colorado Milling & Elevator Co. v. Glenn* (Ky.) 118 F.Supp. 943, where plaintiff was allowed to sue the Director to recover property levied upon by the United States for a tax claim against plaintiff's consignee.

CONCLUSION

The facts in the instant case are clear. Appellee has levied upon property in appellant's hands for taxes due and owing by a third party. Appellant came into possession, or became entitled to receive (in the case of the contract collections), all of these funds before either lien or levy. The only connection that the delinquent taxpayer had to the funds was that it once owned the property which created the funds. The delinquent taxpayer had parted with all ownership in that property long before the government liened or levied.

Thus the case boils down to only two possible triable issues; one, did the taxpayer have sufficient interest in the funds or property claimed by appellant at the time of lien and levy to justify the government's claim; or two, was there any priority in the government's claim over the appellant's chattel mortgage or bill of sale? Both these issues can properly be tried in a quiet title action.

If the trial court finds that the United States has no interest in the funds by virtue of its lien and levy, then the trial court can issue an order, either quashing the distraint, enjoining the levy or decreeing that appellant is the owner of the funds free of any claim from the United States.

If the trial court finds that the United States has some interest in the funds, it can fix priorities, determine amounts, and order disposition of the funds in appellant's hands.

If there were no such procedure as contended for by appellant, then it and others similarly situated would be required forever to await the action of the United States to collect upon its demand, after refusal by the non-taxpayer. The Government has tried to put appellant in that position in this case, making no effort whatsoever on its behalf to decide the question involved, but contenting itself with resisting each and every bona fide attempt on appellant's behalf to clear up the situation.

Other courts have not been satisfied with such an attitude on the part of the government. Even before 1942, they sought and found ways to issue injunctions in similar cases. Since 1942, they have felt more at ease in relieving these burdens, by invoking the quiet title provisions of 28 U.S.C. §2410. Even though the action be framed as a suit to enjoin, a suit to quash a warrant, an action to cancel a lien, or an action to remove a cloud on title, the courts have felt that the quiet title amendment gave them room to act.

The one or two exceptions where §2410 has not afforded relief have been cases where the taxpayer himself was testing the validity of the tax and lien, or where the United States held absolute title to the property involved, or where defects occurred in foreclosure actions requiring judicial sales. None of these exceptions are here involved. The action is not brought by the tax-

payer, the United States had no title and no judicial sale is contemplated.

Appellant cannot pay the tax and sue for a refund as there is no provision in the law for such procedure. Appellant owes a duty to the creditors it represents. It has diligently pursued that duty. It should not be thwarted by the refusal of jurisdiction to determine the right to the funds in controversy. It should be permitted to dispose of the funds in question to the persons entitled thereto and not be required to wait for the government to release the funds in its own manner and time.

To continue to try and defeat appellant's right to an adjudication by every technical means at its disposal, can only mean that the government has little faith in the merits of its position and therefore hopes to win the struggle by delays and procrastination.

Any argument that the granting of jurisdiction in this case would set a bad precedent is spurious. Any third person, whose property is seized for the payment of another's taxes, should be accorded the speediest action to determine his rights. Unless the government makes a practice of seizing the wrong property, there certainly can be made no argument that such suits will greatly increase the litigation burden of the United States. And, if there is such a practice, the United States' litigation burden should be increased. Certainly ordinary taxpayers cannot take advantage of a reversal of this case in favor of appellant because appellant is not the taxpayer involved.

Wherefore, appellant respectfully prays that the

order of dismissal be reversed and that the matter be remanded for trial.

Respectfully submitted.

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